Mohd Shuaib Ishak v Celcom (M) Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D5-24–20 OF 2008
RAMLY ALI J
9 JULY 2008

Companies and Corporations — Members' rights — Petition under Companies Act 1965 s 181 — Derivative action — Statutory application for leave to bring action on behalf of defendant company — Whether plaintiff had locus standi to apply for leave — Whether leave ought to be granted — Whether necessary to prove substantial issues on merit at leave stage — Whether mandatory general offer was illegal and unlawful — Companies Act 1965 ss 181A(1), 181A(4)(b) & 181B(2)

The plaintiff was a former member or shareholder of Celcom (Malaysia) Bhd (Celcom), holding 500,000 ordinary shares in Celcom. This was the plaintiff's application under s 181A(1) of the Companies Act 1965 ('the Act'), for leave to bring an action on behalf of Celcom against certain persons as named in the statement of claim. The plaintiff was seeking leave to bring the present action on behalf of Celcom to remedy what he claimed to be the unlawful and illegal actions of those who had caused Celcom to commit the acts alleged in the plaintiff's proposed statement of claim. In the grounds of his application the plaintiff had submitted, inter alia, that it was unlikely that Celcom would have brought the proposed action as allegations would be made and remedies would be sought in the course of the proposed action against the directors of Celcom as well as the ultimate holding company of Celcom, Telekom Malaysia and the Telekom directors. This proposed action was allegedly in the interest of Celcom as well as its former shareholders. The plaintiff had accordingly given 30 days' notice under s 181B(2) of the Act of his intention to apply for such leave to file an action.

On 4 April 2002, the defendant company, Celcom, had entered into an Amended and Restated Supplemental Agreement ('ARSA') with DeTeAsia and two other companies. According to the terms of the ARSA, Celcom could not merge its business or accept a significant new shareholder without the consent of DeTeAsia failing which Celcom would procure a Buy Out Offer for DeTeAsia at a price of RM7 per Celcom share owned by DeTeAsia. Telekom Malaysia ('TM'), Telekom Enterprise Sdn Bhd ('TESB') and parties acting in concert wished to merge Celcom's business with Telekom's cellular business and take over Ce,lcom. With this in mind, at a board of director's meeting of Celcom on 15 October 2002, the board of directors of Celcom

decided to enter into a sale and purchase agreement ('SPA') with TM, pursuant to which Celcom would acquire TM's entire equity interest in TM Cellular Sdn Bhd from Telekom. Subsequent to such acquisition, Celcom became a subsidiary of TM by virtue of TM's direct and indirect interest in the issued and paid up share capital of Celcom. Pursuant to s 33B(2) of the Securities Commission Act 1993 ('SCA') and Part II of the Malaysian Take-over Code, when TESB had acquired more than 33% of the voting shares in Celcom, TESB and the persons acting in concert were obligated to undertake a mandatory general offer ('MGO') for the remaining voting shares in Celcom not held by TESB and the persons acting in concert. For the purposes of the MGO, the highest price at the time was RM2.75 per Celcom share, being the price stipulated in the SPA and the total cost to Telekom of the MGO was RM3.67b. On 7 March 2003, DeTeAsia commenced arbitration proceedings against Celcom in the International Court of Arbitration pursuant to the ARSA. DeTeAsia alleged that Celcom had acted in breach of the ARSA when it entered into the SPA pursuant to which Celcom acquired TM's entire equity interest in TM Cellular Sdn Bhd without DeTeAsia's consent. If Celcom had sought DeTeAsia's consent as required under the ARSA, DeTeAsia may have refused which would have meant that Celcom would have been obliged to procure a Buy Out Offer at RM7 per Celcom share. DeTeAsia was a substantial shareholder of Celcom at the time of the MGO and in order to mitigate their losses, DeTeAsia had accepted the offer of RM2.75 per Celcom share. If DeTeAsia had received RM7 per Celcom share under the Buy Out Offer then the MGO would have had to be RM7 per Celcom share and the cost to Telekom would have been RM9.34b. Thus, as a result of the breach of the ARSA by Celcom, it became liable to DeTeAsia for damages calculated as the difference between the MGO price of RM2.75 per Celcom share and the Buy Out Offer price under the ARSA of RM7 per Celcom share. The International Court of Arbitration awarded damages amounting to US177,243,679 together with interest as well as payment of all costs to DeTeAsia. Thus, finally Celcom paid damages amounting to US$232,999,745.80 in damages to DeTeAsia.

It was the plaintiff's contention that the damages of US$232,999,745.80, would not have been payable to DeTeAsia if the main beneficiaries of the wrongdoings ie Telekom, TESB and parties acting in concert had not conspired to cause Celcom to breach the ARSA. The plaintiff's application was founded on two complaints namely: first by causing Celcom to enter into the SPA, the directors of Celcom had, inter alia, caused Celcom to breach the ARSA and thereby bear the liability under the arbitration award; and second that by causing Celcom to breach the Buy Out provision in the ARSA the Celcom directors had, inter alia, caused the MGO to take place at RM2.75 per Celcom share rather than at RM7 per share pursuant to the Buy Out provision. The defendants however contended that the real motivation underlying this application by the plaintiff was to pressure the defendants to

A discontinue their legal action against the plaintiff's associates. The defendants therefore contended that this application was just one of the series of tactics used by the plaintiff in ongoing disputes between it and the plaintiff's associates.

B

Held, allowing the application with costs:

(1) The facts and circumstances of the case clearly showed how the events complained of by the plaintiff culminated in the plaintiff ceasing to be a shareholder through the compulsory purchase of the plaintiff's shares by way of the MGO under s 34 of the SCA. As such, the plaintiff was a complainant as defined under s 181A(4)(b) and thus had the locus standi to bring this action on behalf of Celcom as the plaintiff's proposed claim related very closely to the circumstances in which the plaintiff ceased to be a shareholder (see paras 25–26).

(2) The plaintiff as the complainant must satisfy all the requirements under s 181B of the Act before the court can grant leave. The court was satisfied that the plaintiff had given the directors of Celcom 30 days' notice as required under s 181B(2) of the Act (see paras 27–28).

(3) As the plaintiff had proved that there was a legitimate and arguable case that Celcom had a claim against the proposed defendants, the plaintiff could not be said to be acting in bad faith. Although the plaintiff may be acting out of self-interest in wanting to prosecute the derivative action, the self-interest was to maximise the value of his shares in Celcom by pursuing causes of action which he may have against the proposed defendants. Therefore, the plaintiff's self-interest coincided with the interest of Celcom and did not mean that the plaintiff was acting in bad faith. In the present action, the application was primarily instituted by the plaintiff out of a concern for the interest of Celcom and with an honest belief in its merit. The plaintiff's honest belief was evidence of his good faith. The plaintiff may benefit commercially if he succeeds in the derivative action, since the case was a meritorious one, but since the plaintiff was an appropriate person (complainant) to bring the action, there seemed little reason not to allow the action to be brought (see paras 31–32 & 37).

(4) Based on the facts of this case it was unlikely that Celcom would bring the proposed action as allegations would be made and remedies would be sought in the course of the proposed action against the directors of Celcom as well as the ultimate holding company of Celcom, Telekom Malaysia Bhd and the Telekom directors. Leave should be granted to the plaintiff as it was definitely in the best interest of the company if the

proposed action is brought. The plaintiff has adduced sufficient evidence to disclose that it was in the interests of the company to pursue the action (see paras 63 & 65).

(5) In any event, the present application is only an application for leave and therefore it is not necessary for proof of the substantial issues on merits. All that the plaintiff needs to show for leave to be granted as enshrined in s 181A of the Act is that there is a prima facie case and the application is not frivolous and vexatious and there is some substance in the grounds supporting the application (see paras 69 & 114–115).

(6) In the present case by reason through the breaches of the fiduciary duty and statutory duty and fraudulent and/or negligent misrepresentation it was apparent that the proposed defendants may have wrongfully and maliciously and by unlawful means and or fraudulently conspired and combined amongst themselves to injure Celcom and its shareholders. By reason of the breaches committed by the directors of Celcom and parties acting in concert of the relevant provisions of law, all contracts made in connection with the MGO and the SPA and all contracts for the purchase of or subscription for Celcom shares under the MGO may be considered illegal for breach of s 24 of the Contracts Act 1950 and may be set aside if duly proven by evidence during trial of the proposed action (see paras 93, 95 & 99).

[Bahasa Malaysia summary

Plaintif adalah bekas ahli atau pemegang saham Celcom (Malaysia) Bhd (Celcom), memegang 500,000 saham biasa. Ini merupakan permohonan plaintif di bawah s 181A(1) Akta Syarikat 1985 (Akta tersebut), untuk suatu kebenaran membawa tindakan bagi pihak Celcom terhadap orang tertentu yang dinamakan dalam penyataan tuntutan. Plaintif meminta kebenaran untuk membawa tindakan ini bagi pihak Celcom untuk memulihkan apa yang dikatakannya menyalahi undang-undang oleh pihak-pihak yang menyebabkan Celcom melakukan tindakan-tindakan yang dituduh dalam penyataan tuntutan cadangan plaintif. Di dalam alasan-alasan permohonannya, plaintif menyatakan, antara lain, bahawa tidak mungkin Celcom membawa tindakan yang dicadangkan kerana tuduhan-tuduhan akan dilemparkan dan remedi-remedi akan dipohon semasa tindakan cadangan diambil, terhadap pengarah-pengarah Celcom dan juga syarikat induk Celcom, Telekom Malaysia dan pengarah-pengarah Telekom. Tindakan yang dicadangkan ini dikatakan untuk kepentingan Celcom dan juga bekas pemegang-pemegang sahamnya. Plaintif telah memberi notis 30 hari di bawah s 181B(2) Akta tersebut tentang niatnya memohon kebenaran untuk memfailkan tindakan.

Pada 4 April 2002, syarikat defendan, Celcom, menandatangani 'Amended

A and Restated Supplemental Agreement' ('ARSA') dengan DeTeAsia dan dua lagi syarikat. Menurut terma-terma ARSA, Celcom tidak boleh menggabungkan perniagaannya atau menerima pemegang saham penting yang baru, tanpa persetujuan Celcom. Jika gagal mematuhi terma-terma tersebut, Celcom perlu membuat penawaran kepada DeTeAsia untuk suatu B belian kuasa pada harga RM7 sesaham, saham Celcom yang dimiliki oleh DeTeAsia. Telekom Malaysia ('TM'), Telekom Enterprise Sdn Bhd ('TESB') dan pihak-pihak lain yang bertindak bersama-sama, ingin menggabungkan perniagaan Celcom dengan perniagaan komunikasi selular Telekom dan mengambil alih Celcom. Dengan mengambil kira ini, dalam mesyuarat ahli C lembaga pengarah pada 15 Oktober 2002, ahli lembaga pengarah Celcom memutuskan untuk menandatangani perjanjian jual beli ('SPA') bersama TM, di mana, Celcom akan memperoleh kesemua kepentingan ekuiti dalam TM Cellular Sdn Bhd daripada Telekom. Berikutan pengambilalihan tersebut, Celcom menjadi anak syarikat kepada TM disebabkan oleh D kepentingan langsung dan tidak langsung TM dalam saham modal terbitan dan berbayar Celcom. Menurut s 33B(2) Akta Suruhanjaya Sekuriti 1993 ('SCA') dan Bahagian II Kanun Pengambilalihan Malaysia, apabila TESB memperoleh lebih daripada 33% saham boleh undi dalam Celcom, TESB dan orang-orang yang bertindak bersama-sama berkewajipan untuk E menawarkan suatu tawaran umum wajib ('MGO') bagi saham lain dalam Celcom yang tidak dimiliki oleh TESB dan orang-orang yang bertindak bersama-sama itu. Bagi tujuan MGO, harga tertinggi pada masa itu ialah RM 2.75 sesaham, menurut harga yang ditawarkan dalam SPA dan jumlah keseluruhan kos bagi Telekom untuk MGO itu ialah RM3.67b. Pada 7 Mac F 2003, DeTeAsia memulakan prosiding timbangtara terhadap Celcom di Mahkamah Timbangtara Antarabangsa, berdasarkan ARSA. DeTeAsia mendakwa Celcom telah melanggar ARSA apabila menandatangani SPA di mana Celcom memperoleh kesemua kepentingan ekuiti TM dalam TM Cellular Sdn Bhd tanpa persetujuan DeTeAsia. Jika Celcom meminta G persetujuan DeTeAsia seperti yang dikehendaki oleh ARSA, DeTeAsia tentu tidak akan bersetuju dan ini bermakna Celcom wajib menawarkan suatu pembelian kuasa pada harga RM7 sesaham, saham Celcom. DeTeAsia merupakan pemegang saham penting Celcom pada masa MGO itu dan untuk mengurangkan kerugian, DeTeAsia menerima tawaran RM2.75 H sesaham, saham Celcom. Jika DeTeAsia menerima RM7 sesaham saham Celcom pada tawaran pembelian kuasa, MGO itu tentunya pada RM7 sesaham dan kos ke atas Telekom pada harga RM9.34b. Oleh itu, atas perlanggaran ARSA oleh Celcom, DeTeAsia bertanggungjawab atas kerugian perbezaan harga MGO pada harga RM2.75 sesaham saham Celcom dan I harga tawaran pembelian kuasa di bawah ARSA pada harga RM7 sesaham saham Celcom. Mahkamah Timbangtara Antarabangsa mengawardkan ganti rugi sejumlah US$177,243,679, bersama faedah dan juga keseluruhan kos kepada DeTeAsia. Akhirnya, Celcom membayar ganti rugi sejumlah US$232,999,745.80 kepada DeTeAsia.

Plaintif menghujahkan bahawa ganti rugi sebanyak US$232,999,745.80 tidak perlu dibayar kepada DeTeAsia jika benefisiari-benefisiari utama salah laku tersebut, ie Telekom, TESB dan pihak-pihak bertindak bersama, tidak bersekongkol menyebabkan Celcom melanggar ARSA tersebut. Permohonan plaintif adalah berdasarkan dua aduan, iaitu: pertama, dengan menyebabkan Celcom menandatangani SPA tersebut, pengarah-pengarah Celcom telah, antara lain, menyebabkan Celcom melanggar ARSA dan oleh itu, bertanggungjawab menanggung liabiliti di bawah award timbangtara; dan kedua, dengan menyebabkan Celcom melanggar peruntukan pembelian kuasa ARSA, pengarah-pengarah Celcom, inter alia, telah menyebabkan MGO itu ditetapkan pada harga RM2.75 sesaham, saham Celcom, daripada RM7 sesaham, menurut peruntukan pembelian kuasa tersebut. Walau bagaimanapun, defendan-defendan menghujah bahawa motivasi sebenar yang mendasari permohonan ini oleh plaintif adalah untuk mendesak defendan-defendan menghentikan tindakan undang-undang mereka terhadap sekutu plaintif. Defendan-defendan oleh itu menghujah bahawa permohonan ini hanyalah salah satu daripada taktik plaintif dalam pertelingkahan yang sudah berpanjangan antaranya dan sekutu plaintif.

Diputuskan, membenarkan permohonan dengan kos:

(1) Fakta dan keadaan kes jelas menunjukkan bagaimana peristiwa yang diperkatakan oleh plaintif memuncak apabila plaintif tidak lagi menjadi pemegang saham melalui pembelian wajib saham-saham plaintif atas sebab MGO di bawah s 34 SCA. Kerana itu, plaintif merupakan seorang pengadu seperti yang ditakrifkan di bawah s 181A(4)(b) dan mempunyai locus standi untuk membawa tindakan ini bagi pihak Celcom memandangkan tuntutan plaintif berkait rapat dengan keadaan di mana plaintif tidak lagi menjadi pemegang saham. (lihat perenggan 25–26).

(2) Plaintif sebagai pengadu mesti memenuhi kesemua kehendak s 181B Akta tersebut supaya mahkamah memberikan kebenarannya. Mahkamah berpuas hati bahawa plaintif telah memberi notis 30 hari kepada pengarah-pengarah Celcom seperti yang dikehendaki oleh s 181B(2) Akta tersebut (lihat perenggan 27–28).

(3) Oleh sebab plaintif berjaya membuktikan bahawa adanya kes yang sah dan boleh hujah bahawa Celcom mempunyai tuntutan terhadap defendan-defendan yang dicadangkan, tidak boleh dikatakan bahawa pihak plaintif bertindak dengan niat buruk. Walaupun plaintif berkemungkinan bertindak berdasarkan kepentingan peribadi kerana mahukan tindakan terbitan, namun tindakan itu adalah untuk memaksimakan nilai sahamnya dalam Celcom, dengan cara meneruskan kausa-kausa tindakan yang mungkin ada terhadap

defendan-defendan yang dicadangkan. Oleh itu, kepentingan peribadi plaintif berkebetulan dengan kepentingan Celcom dan tidak bermakna plaintif bertindak dengan niat buruk. Dalam tindakan ini, secara asasnya permohonan ini dimulakan oleh plaintif kerana bimbang akan kepentingan Celcom dan percaya dengan tulus bahawa tindakan ini bermerit. Kepercayaan tulus plaintiff membuktikan niat baiknya. Plaintif berkemungkinan mengaut keuntungan jika dia berjaya dalam tindakan terbitan tersebut, memandangkan kes itu bermerit, tetapi oleh sebab plaintif ialah orang yang sesuai (pengadu) membawa tindakan ini, tiada sebab mengapa tindakan tidak patut dibenarkan. (lihat perenggan 31–32 & 37).

(4) Berdasarkan fakta-fakta kes, tidak mungkin Celcom akan membawa tindakan cadangan tersebut kerana tuduhan-tuduhan akan dibuat dan remedi-remedi akan dipohon semasa tindakan cadangan terhadap pengarah-pengarah Celcom dan juga syarikat utama Celcom, Telekom Malaysia Bhd dan pengarah-pengarah Telekom. Kebenaran perlu diberikan kepada plaintif oleh sebab jika tindakan cadangan itu diambil, adalah demi kepentingan syarikat itu juga. Plaintif berjaya mengemukakan bukti yang cukup untuk menunjukkan bahawa tindakan tersebut perlu diteruskan demi kepentingan syarikat (lihat perenggan 63 & 65).

(5) Walau apa pun, permohonan ini hanya permohonan kebenaran, maka tidak memerlukan bukti bagi isu-isu matan atas merit. Plaintif hanya perlu membuktikan bahawa adanya satu kes prima facie dan permohonan ini tidak remeh dan menyusahkan dan terdapat alasan-alasan kukuh menyokong permohonan tersebut (lihat perenggan 69 & 114–115).

(6) Dalam kes ini, oleh sebab pelanggaran kewajipan fidusiari dan statutori, dan juga salah nyata fraud dan/atau kecuaian, adalah jelas bahawa defendan-defendan yang dicadangkan berkemungkinan secara salah dan berniat jahat dan menggunakan cara yang tidak sah dan/atau berkonspirasi secara fraud dan bergabung untuk menjejaskan Celcom dan pemegang-pemegang sahamnya. Atas sebab pelanggaran beberapa peruntukan undang-undang oleh pengarah-pengarah Celcom dan pihak-pihak yang bertindak bersama-sama, semua perjanjian yang dibuat berkaitan dengan MGO dan SPA dan kesemua perjanjian belian atau yuran saham Celcom di bawah MGO mungkin dianggap tidak sah atas sebab pelanggaran s 24 Akta Kontrak 1950 dan mungkin akan diketepikan jika dapat dibuktikan semasa perbicaraan tindakan cadangan tersebut (lihat perenggan 93, 95 & 99).]

Notes

For a case on petition under Companies Act 1965 s 181, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 550.

Cases referred to

Agus Irawan v Toh Teck Chye [2002] 2 SLR 198 (refd)
Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association [1990] 3 MLJ 228 (refd)
Bellman v Western Approaches Ltd (1981) 33 BCLR 45 (refd)
Belmont Finance Corp v Williams Furniture Ltd & Ors (No 2) [1980] 1 All ER 393 (refd)
Carr v Cheng [2005] BCSC 445 (refd)
Coleman v Myers [1977] 2 NZLR 225 (refd)
Clear Water Sanctuary Golf Management Bhd v Ketua Pengarah Perhubungan Perusahaan & Anor [2007] 6 MLJ 446 (refd)
Discovery Enterprises Inc v Ebco Industries Ltd [1997] BCTC LEXIS 5338 (refd)
Gething v Kilner [1972] 1 All ER 1166 (refd)
Hock Hua Bank (Sabah) Bhd v Lam Tat Ming & Ors [1995] 4 MLJ 328 (refd)
Howard Smith Ltd v Ampol Petroleum Ltd [1974] AC 821; [1974] 1 All ER 1126 (refd)
Kheng Chwee Lian v Wong Tak Thong [1983] 2 MLJ 320 (refd)
Kuwait Oil Tanker Co SAK & Anor v Al Bader & Ors [2000] 2 All ER 271 (refd)
Lornho plc & Ors v Fayed & Ors (No 5) [1994] 1 All ER 188 (refd)
Marc-Jay Investments Inc v Levy (1974) 5 OR (2d) 235 (refd)
Mrs Kok Wee Kiat v Kuala Lumpur Stock Exchange Bhd & Ors 1979] 1 MLJ 71 (refd)
Nortwest Forest Products Ltd, Re [1975] 4 WWR 724 (refd)
Pertab Chunder Ghose v Mohendra Purkait [1888–1889] 16 IA 233 (refd)
Primex Investments Ltd v Northwest Sports Enterprise Ltd (1995) 13 BCLR (3d) 300; Can Lll 717 (refd)
QSR Brands Bhd v Suruhanjaya Sekuriti & Anor [2006] 3 MLJ 164 (refd)
Raffles Hotel Ltd v L Rayner [1965] 1 MLJ 60 (refd)
Richardson Greenshields v Kalmacoff (1995) 22 OR (3d) 577 (refd)
Scottish Co-Operative Wholesale Society v Meyer [1958] 3 All ER 66 (refd)
Seow Tiong Siew v Kwok Low Mong Lawrence & Ors [2000] 4 SLR 768 (refd)
Shahidan Shafie v Atlan Holdings Bhd & Anor [2005] MLJU 279; [2005] 3 CLJ 793 (refd)
Teo Gek Luang v Ng Ai Tiong & Ors [1999] 1 SLR 434 (refd)
Tremblett v SCB Fisheries Ltd [1993] 116 Nfld & PEIR 139 (refd)
Winpac Paper Products Ltd, Re; Seow Tiong Siew v Kwok Low Mong Lawrence & Ors [2000] 4 SLR 768 (refd)

Legislation referred to

Banking and Financial Institution Act 1989
British Columbia Company Act 1979 [Can] s 225
Business Corporation Act SBC 2002 ss 232, 233

Companies Act 1965 ss 67, 131, 181A, 181A(1), 181A(4), 181A(4)(b), 181B, 181B(2), 181B(4)(b), 181E
Contracts Act 1950 ss 18, 24
Malaysian Code on Take-Overs and Mergers 1998 ss 14, 15, 16, 20(1), 34, 35, 36, 38, 39, Schedules 1, 2, Practice Notes 1.3, 4.1, 4.2, 4.3, 4.4
Securities Commission Act 1993 ss 33, 33A, 33A(1), 33B, 33B(2), 33D, 33E, 34, 34B, 34C
Securities Industry Act 1983

Low Chi Chiang (Cheah Kit Yee with him) (Lim Kean Leong & Co) for the plaintiff.
KS Nathan (N Segaran with him) (Shearn Delamore & Co) for the defendant.

Ramly Ali J:

INTRODUCTION

[1] Enclosure 1 is the plaintiff's originating summons dated 17 January 2008, being an application under s 181A(1) of the Companies Act 1965 for leave to bring an action on behalf of the defendant company ('Celcom') against those persons named in the proposed statement of claim exhibited to the said originating summons.

[2] The grounds of the application are as follows:

(a) the directors of Celcom (Malaysia) Bhd have been given 30 days' notice and informed by letter dated 14 December 2007 sent pursuant to s 181(B)(2) of the Companies Act 1965 of the plaintiff's intention to apply for leave pursuant to s 181(A)(1) of the Companies Act 1965 to file the proposed action;

(b) the plaintiff is acting bona fide in seeking leave to bring the proposed action in the name of Celcom (Malaysia) Bhd;

(c) the proposed action is in the interests of Celcom and its shareholders;

(d) it is unlikely that Celcom will bring the proposed action as allegations will be made and remedies will be sought (including substantial damages) in the course of the proposed action against the directors of Celcom as well as the ultimate holding company of Celcom, Telekom Malaysia Bhd and the Telekom directors;

(e) in a nutshell, the main allegations in the proposed statement fo claim to the proposed action are that:

(i) Celcom and DeTeAsia had agreed under the terms of an Amended and Restated Supplemental Agreement dated 4 April 2002 ('the ARSA') that Celcom would not merge its business or accept a

significant new shareholder without the consent of DeTeAsia failing which Celcom would procure a buy out offer for DeTeAsia at a price of RM7 per Celcom share owned by DeTeAsia;

(ii) Telekom and Telekom Enterprise (and parties acting in concert) wished to merge Celcom's business with Telekom's cellular business and to take over Celcom;

(iii) in order to achieve these goals Telekom, which by then had effective control of Celcom although it did not own a majority of Celcom's shares, entered into an agreement with Celcom dated 28 October 2002 (the 'SPA'), inter alia, for the acquisition by Celcom of 100% equity interest in TM Cellular Sdn Bhd from Telekom (the 'Acquisition');

(iv) under the terms of the SPA Celcom agreed to issue Celcom shares to Telekom and this resulted in Telekom and Telekom Enterprise as well as parties acting in concert incurring an obligation to make a mandatory general offer (MGO) for all the shares in Celcom which they did not own;

(v) the offer price under the MGO was RM2.75 per Celcom share and the total cost to Telekom of the MGO was RM3.67b;

(vi) if Celcom had sought DeTeAsia's consent as required under the ARSA, DeTeAsia may have refused which would have meant that Celcom would have been obliged to procure a buy out offer at RM7 per Celcom share for DeTeAsia under the ARSA;

(vii) if DeTeAsia had received RM7 per Celcom share under the buy out offer then the MGO would have had to be at RM7 per Celcom share and the cost to Telekom would have been RM9.34b;

(viii) in order to save Telekom from the burden of making an MGO at a cost of RM9.34b (instead of only RM3.67b) and also to avoid the need to seek DeTeAsia's consent to the SPA, the defendants are alleged to have conspired to cause Celcom to breach its obligations under the ARSA;

(ix) thus Celcom at the behest of the defendants to the proposed action proceeded to breach the ARSA by entering into the SPA for the acquisition of TM Cellular without first obtaining consent from DeTeAsia and without procuring a buy out offer for DeTeAsia for its shares in Celcom at a price of RM7 per Celcom share as required by the ARSA;

(x) as a result of the breach by Celcom of the ARSA, Celcom became liable to DeTeAsia for damages calculated as the difference between

A the MGO Price of RM2.75 per Celcom share and the buy out offer price under the ARSA of RM7 per Celcom share;

(xi) DeTeAsia referred its claim to arbitration under the International Chamber of Commerce and was awarded damages amounting to
B US$177,243,679 together with interest at 8% with effect from 16 October 2002 until payment as well as all costs of the ICC Arbitration amounting to US$820,000 as well as DeTeAsia's legal costs amounting to US$1,800,000;

C (xii) the sum paid by Celcom in damages to DeTeAsia amounted to US$232,999,745.80;

(xiii) this sum would not have been payable by Celcom to DeTeAsia if the defendants had not conspired to cause Celcom to breach the ARSA;

D (xiv) the main beneficiaries of the wrongdoings have been Telekom, Telekom Enterprise and parties acting in concert as they have succeeded in taking over Celcom at a relatively cheap price and the financial burden of paying compensation to DeTeAsia was passed on
E to Celcom;

(xv) the main loser has been Celcom, which needlessly had to pay compensation to DeTeAsia (when all Celcom had to do was to obtain DeTeAsia's consent to the SPA or procure a buy out offer for DeTeAsia at RM7 per share, which would not have cost Celcom any
F money as this would have had to be paid by Telekom since Telekom would have been the purchaser) and the shareholders of Celcom who should have received RM7 per share instead of RM2.75 under the MGO;

G (xvi) the plaintiff alleges that the main culprits are the defendants to the proposed action, who perpetrated the conspiracy.

FACTUAL BACKGROUNDS

H **[3]** Briefly, the factual background is as follows:

(a) by letter dated 14 December 2007, the plaintiff served on the named Celcom directors, notices pursuant to s 181B(2) of the Companies Act 1965, notifying the named Celcom directors that the plaintiff intended
I to make an application to bring an action on behalf of Celcom against the proposed defendants.

(b) the plaintiff's application concerns the alleged breach of the terms of an Amended and Restated Supplemental Agreement dated 4 April 2002

('ARSA'). The ARSA was entered into by DeTeAsia, Technology Resources Industries Bhd ('TRI'), Celcom and TR International Limited ('TRIL'). A

(c) In the ARSA, it was stipulated that the written consent of DeTeAsia was required prior to TRI and/or Celcom, inter alia: (i) concluding and/or executing any agreement to allot or issue shares to any entity where the shares to be allotted or issued constituted at least 5% of the aggregate number of TRI or Celcom shares in issue at the relevant time and (ii) concluding and/or executing any agreement to acquire shares in an entity whose principal business is in the communication industry; and (iii) concluding and/or executing any agreement to merge with an entity whose principal business is in the communication industry. These rights are found in cll 4.1, 4.4 and 5.1(c) of the ARSA. B C

(d) The ARSA also contained what was known as the 'buy out provision' in Schedule 1 thereto. This provision stated that if the prior written consent DeTeAsia was not obtained in respect of the matters DeTeAsia was entitled to receive an offer ('Buy-Out Offer') procured by Celcom from a third party for the purchase by the third party DeTeAsia's Celcom shares at one of the two following pricing levels: D E

(i) the average (in US dollars) of the published Intra-day Average market price for Celcom shares in the 60 trading days preceding the date of the offer referred to hereinabove plus a premium of 30%; or

(ii) USD1.84 (approximately RM7) per Celcom share. F

(e) On 7 March 2003, DeTeAsia commenced arbitration proceeding against Celcom in the International Court of Arbitration of the International Chamber of Commerce (ICC) in Paris pursuant to cl 8.6 of the ARSA. G

(f) DeTeAsia alleged that by entering into a sale and purchase agreement ('conditional SPA') pursuant to which Celcom acquired TM's entire equity interest in TM Cellular Sdn Bhd (which was a 'telco' company) without the consent DeTeAsia, Celcom had acted in breach of the ARSA. H

(g) DeTeAsia was a substantial shareholder of Celcom at the time of the MGO, holding 158,477,000 or 6.05% of the total shares in Celcom. In order to mitigate their alleged losses, DeTeAsia accepted an offer for each of their Celcom shares at RM2.75 per Celcom share under the mandatory general offer (MGO). I

(h) DeTeAsia further sought damages to be calculated by reference to the provisions of Schedule 1 of ARSA with interest at eight percent (8%) per annum from 16 October 2002 and costs.

(i) Celcom properly defended the arbitration. However, pursuant to the award dated 2 August 2005 handed down on 30 August 2005, the tribunal found Celcom liable for breach of cll 4.1, 4.4 and 5.1(c) of the ARSA and consequent to such finding, the tribunal found Celcom liable to DeTeAsia in respect of the sum of USD177,243,609 plus USD16,252,139 representing simple interest at the rate of 8% for the period from 16 October 2002 to 27 June 2003 and simple interest at the rate of 8% on the principal sum awarded from 28.6.2003 until payment. The Tribunal calculated those damages as the difference between RM7 and RM2.75 (that DeTeAsia received under the mandatory general offer in order to mitigate its losses), for each of DeTeAsia Celcom shares.

THE SALE AND PURCHASE AGREEMENT (CONDITIONAL SPA)

[4] The circumstances of Celcom's entry into the conditional SPA briefly are as follows:

At a board of directors meeting of Celcom on 15 October 2002, the board of directors of Celcom decided to enter into the conditional SPA with TM, pursuant to which Celcom would acquire TM's entire equity interest in TM Cellular Sdn Bhd. Under the conditional SPA, as payment for the acquisition of TM Cellular, Celcom was to issue to TM 635,471,698 new ordinary shares of RM1 each in Celcom at an issue price of RM2.65 per share. On 28 October 2002, Celcom entered into the conditional SPA. It is not disputed that Celcom did not request DeTeAsia consent.

[5] The acquisition was completed on 17 April 2003. The conditional SPA was subject to a number of condition precedent. The last of the condition precedents under the conditional SPA was met on 3 April 2003.

[6] On 3 April 2003, Celcom received a notice of mandatory offer from Commerce International Merchant Bankers Bhd ('CIMB') as an adviser for Telekom Enterprise Sdn Bhd ('TESB') to acquire the remaining 1,335,136,722 Celcom shares of RM1 each representing approximately 67.31% of the issued and paid up share capital of Celcom as at 7 February 2003 which were not already owned by TESB and persons acting in concert for a cash price of RM2.75 per share.

[7] At the date of completion of the conditional SPA on 17 April 2003, TESB's equity interest in Celcom had increased from 29.16% to 46.35% whilst the collective aggregate interest of TESB and the persons acting in concert in Celcom had correspondingly increased from 32.69% to 49.02%.

[8] By 22 April 2003, TESB had acquired an additional 55,000,000

Celcom shares at RM2.715 per share through direct business transactions on the same date. Pursuant to this additional acquisition, TESB's interest in Celcom had increased to 48.45% whilst the collective aggregate interest of TESB and the persons acting in concert in Celcom had correspondingly increased to 51.12%. Accordingly, subsequent to such acquisition Celcom had become a subsidiary of TM by virtue of TM's direct and indirect interests in 50.03% of the issued and paid up share capital of Celcom.

[9] Pursuant to s 33B(2) of the Securities Commission Act 1993 and Part II of the Malaysian Take-Over Code, by virtue of TESB having acquired more than 33% of the voting shares in Celcom, TESB and the person acting in concert were obligated to undertake a mandatory general offer (MGO) for the remaining voting shares in Celcom not held by TESB and the persons acting in concert at no less than the highest price which TESB and the persons acting in concert had paid or agreed to pay for Celcom shares in the period of six months prior to the commencement of the offer period as defined in the Take-Over Code, that is, in the six months prior to the notice of MGO dated 3 April 2003. For the purposes of the MGO, the highest price at the time was RM2.75 per Celcom shares, being the price stipulated at cl 8.3 of the conditional SPA.

[10] CIMB was appointed as advisor to TESB and TM in relation to the take over offer and accordingly issued the offer document dated 23 May 2003 in relation to the MGO for and on behalf of TESB.

[11] Aseambankers Malaysia Bhd was appointed as independent advisor to the Celcom shareholders by the Celcom board of directors as required by s 15 of the Take-Over Code. Aseambankers accordingly issued the Independent Advice Circular dated 30 May 2008 ('IAC') to the shareholders of Celcom.

[12] By 19 June 2003, TM had received acceptances under the MGO in respect of a total of 1,183,550 Celcom shares, comprising 45.2% of the total issued and paid up share capital of Celcom. Together with the 51.12% already held by TM, this meant that TM had acquired 96.32% of the issued share capital of Celcom. TM thereafter effected a compulsory purchase of the remaining shares in Celcom pursuant to s 34 of the Securities Commission Act 1993.

[13] On or about 17 September 2003 the plaintiff was required to sell his 500,000 ordinary shares in Celcom to TM for RM2.75 per share (equivalent to a consideration of RM1,375,000).

THE PLAINTIFF'S APPLICATION

[14] The plaintiff's application is founded on two complaints namely:

(a) First, by causing Celcom to enter into the conditional SPA, the

directors of Celcom, inter alia, caused Celcom to breach the ARSA. The directors of Celcom, inter alia, further caused Celcom to breach the Buy-Out Provision in the ARSA, thereby causing loss to Celcom by reason of Celcom's liability under the Arbitration Award;

(b) Second, by causing Celcom to breach the Buy-Out provision in the ARSA, the Celcom directors, inter alia, caused the MGO to take place at a lower price than it would have, had TM made an offer for each of DeTeAsia Celcom shares at RM7 per share pursuant to the Buy-Out provision. the plaintiff alleges, inter alia, that Celcom directors, therefore caused loss to the former shareholders of Celcom by causing the MGO to take place at RM2.75 per Celcom share, rather than at RM7 per Celcom share.

THE CONCEPT OF THE 'STATUTORY DERIVATIVE ACTION' UNDER SS 181A, 181B AND 181E OF THE COMPANIES ACT 1965

[15] The amendment introducing the statutory derivative action into Malaysian Law (through ss 181A, 181B and 181E of the Companies Act 1965) are relatively new, having come into force on 15 August 2007. As such, as of today there is little or no authority governing those new provisions.

Thus in this case, the court relies upon authorities considering similar provisions in other common law jurisdictions. This is appropriate where the comparator statutory provisions is in pari materia with the Malaysian provisions.

[16] Section 181A provides:

(1) A Complainant may, with the leave of the Court, bring, intervene in or defend an action on behalf of the company.

(2) Proceedings brought under this section shall be brought in the company's name.

(3) The right of any person to bring, intervene in, defend or discontinue any proceedings on behalf of a company at common law is not abrogated.

(4) For the purposes of this section and sections 181B and 181E, 'complainant' means:

(a) a member of a company, or a person who is entitled to be registered as a member of a company;

(b) a former member of a company if the application relates to circumstances in which the member ceased to be a member;

(c) any director of a company; or

(d) the Registrar, in case of a declared company under Part IX.

[17] Section 181B provides:

(1) An application for leave of the Court under section 181A shall be made by originating summons and no appearance need to be entered.

(2) The complainant shall give thirty days notice in writing to the directors of his intention to apply for the leave of Court under section 181A.

(3) Where leave has been granted pursuant to an application under section 181A, the complainant shall initiate proceedings in Court within thirty days from the grant of leave.

(4) In deciding whether or not leave shall be granted the Court shall take into account whether:

(a) the complainant is acting in good faith; and

(b) it appears prima facie to be in the best interest of the company that the application for leave be granted.

[18] Section 181A therefore provides that a complainant may bring an action on behalf of a company (in the company's name) if he:

(a) obtain leave of the court; and

(b) demonstrates that he is a complainant within the meaning of s 181A(4).

[19] Section 181B therefore provides that when deciding whether complainant may be granted leave, the court may take into account, amongst other things:

(a) whether the complainant is acting in good faith; and

(b) whether it appears prima facie to be in the best interests of the company that the application for leave be granted.

[20] Section 181E further provides, inter alia, that in granting leave under s 181B, the court may make such orders as it thinks appropriate including an order authorising the complainant or any other person to control the conduct of the proceedings; giving directions for the conduct of the proceedings or for any person to provide assistance and information to the complainant, including to allow inspection of company's books.

[21] An application for leave under ss 181A and 181B can only be initiated by a 'complainant'. The term 'complainant' is defined under s 181A(4) of the Companies Act 1965 as:

(a) a member of a company, or a person who is entitled to be registered as member of a company;

(b) a former member of a company if the application relates to circumstances in which the member ceased to be a member;

(c) any director of a company; or

(d) the Registrar, in case of a declared company under Part IX.

[22] The plaintiff claims to fall under category (b) of s 181A(4) ie the plaintiff is a former member (shareholder) of Celcom (the company is question) and that the application relates to circumstances in which he ceased to be a member.

[23] In the present case, it is not in dispute that the plaintiff was a member/shareholder of Celcom, holding 500,000 ordinary shares in Celcom, prior to 17 September 2003 when the plaintiff was required to sell all his shares to TM for RM2.75 per share (equivalent to a consideration of RM1,375,000) as a result of the MGO, issued under s 34 of the Securities Commission Act 1993.

[24] The plaintiff's application relates to circumstances in which plaintiff ceased to a member of Celcom. The nexus between the plaintiff ceasing to be a member on shareholder of Celcom and the circumstances of the proposed claim can easily be seen from the following facts:

(i) the compulsory purchase of the plaintiff's shares in Celcom by Telekom Enterprise by way of the MGO under s 34 of the Securities Commission Act 1993 was only made possible as a direct result Telekom Enterprise and Telekom acquiring sufficient shares of Celcom under the MGO to enable them to take advantage of the compulsory purchase provisions under s 34 of the Securities Commission Act 1993;

(ii) the MGO was itself triggered by the conditional SPA for the merger of the Cellular businesses of Celcom and TM Cellular. The MGO was legally required as a direct result of the conditional SPA;

(iii) the conditional SPA was entered into in direct breach of the buy out provision in the ARSA. The conditional SPA was entered into without the consent of DeTeAsia and triggered the buy out provision at RM7 per Celcom share under the ARSA;

(iv) the breach of the buy out provision in the ARSA resulted in the Award

under the ICC Arbitration which required Celcom to pay US$232,999,745.80 in damages and costs to DeTeAsia;

(v) the entire process, including the conditional SPA for the merger of the Cellular businesses of Celcom and TM Cellular and the MGO at the price of RM2.75 per Celcom share appears to have been planned and strategized by the defendants, especially Telekom and its advisors well in advance of their execution.

[25] The summary set out above clearly shows how the events complained of by the plaintiff culminated in the plaintiff ceasing to be a shareholder through the compulsory purchase of the plaintiff's shares by way of the MGO under s 34 of the Securities Commission Act 1993.

[26] Therefore, the court is satisfied that the plaintiff is a 'complainant' as defined under s 181A(4)(b) and thus has the locus standi to bring this action on behalf of Celcom as the plaintiff's proposed claim relates very closely to the circumstances in which plaintiff ceased to be a shareholder.

[27] In deciding whether or not leave should be granted, the court shall take into considerations all the requirements under s 181B. The plaintiff as the complainant must show to the court that:

(a) a thirty days notice in writing has been given to the directors of his intention to apply for the leave of the court;

(b) the complainant is acting in good faith; and

(c) it appears prima facie to be in the interest of the company that the application for leave is granted.

30 DAYS NOTICE TO THE DIRECTORS

[28] With respect to the condition set out in s 181B(2) of the Companies Act 1965, the court is satisfied that there is no issue with regard to the compliance of this condition. The directors of Celcom have been given 30 days' notice and informed by letter dated 14 December 2007 sent pursuant to s 181B(2) of the Companies Act 1965 of the plaintiff's intention to apply for leave pursuant to s 181A(1) of the Companies Act 1965 to file the proposed action. A letter addressed to the directors of Celcom was sent by hand on 14 December 2007 to the registered office of Celcom.

ACTING IN GOOD FAITH

[29] In establishing his case, it is necessary for the plaintiff to bring cogent

evidence to establish clearly that the application is infact brought in good faith (see *Tremblett v SCB Fisheries Ltd* [1993] 116 Nfld & PEIR 139).

[30] The test for good faith was dealt with by the Supreme Court of British Columbia in *Primex Investments Ltd v Northwest Sports Enterprise Ltd* [1995] Can Lll 717 (BC SC), where the court considered the requirement under s 225 of the BC Company Act in an action where the petitioner applies for leave to bring a derivative action in the name of Northwest Sports Enterprise Ltd against several of its current directors, together with companies in which some of them have an interest. Mr Justice Tysoe in finding the applicant acted in good faith appears to tie the requirement of 'good faith' to the test of the 'interest of the company'. He stated that were there is an arguable case, the applicant cannot be said to be acting in bad faith because he wants the company to pursue what he genuinely considers to be a valid claim. In that case, there was no evidence the applicant was using the prospect of a derivative action as a threat in order to extract some advantage from the company. Tysoe J also indicates that an applicant advancing self-interest is not necessarily acting in bad faith.

[31] In the present case, the plaintiff has proved that there is an arguable case that Celcom has a claim against the proposed defendants. The plaintiff cannot be said to be acting in bad faith because he wants Celcom to pursue what he genuinely considers to be a valid claim against the proposed defendants. The action sought to be instituted is a legitimate and arguable one.

[32] The plaintiff may be acting out of self-interest in wanting to prosecute the derivative action. The self-interest is to maximise the value of his shares in Celcom by pursuing causes of action which he may have against the proposed defendants. The plaintiff's self-interest coincides with the interest of Celcom. This does not mean the plaintiff is acting in bad faith. Anything that benefits the company (Celcom) will indirectly benefit the shareholders by increasing the share value and it is hard to imagine a situation where a shareholder will not have a self-interest in wanting the company (in this case, Celcom) to prosecute an action which is in its interest to prosecute (see *Richardson Greenshields v Kalmacoff* (1995) 22 OR (3d) 577 (Ont CA); *Primex Investment Ltd*.

[33] Although the relevant provisions of ss 181A and 181B are of remedial legislation enacted to in place a procedure to protect the interest of minority shareholders, the interpretation of the provisions should be purposive. The Ontario Court of Appeal in *Richardson Greenshields* had stated that a 'liberal interpretation infavour of the complainant' should be given. However, the court must be cautions not to allow such provisions to be abused by minority

shareholder in their attempt to challenge management decisions of the board of directors of the company. In this respect, the appellate court (in *Richardson Greenshields'* case) had stressed that *before granting leave, the court should be satisfied that there is a reasonable basis for the complaint and that the action sought to be instituted is a legitimate or arguable one.*

[34] The same principle was put in another way by O'Leary J in *Re Marc-Jay Investments Inc v Levy* (1974) 5 OR (2d) 235, where at p 237, the judge said:

> I believe it is my function to deny the application if it appears that the intended action is frivolous or vexatious or is bound to be unsuccessful.

[35] In *Teo Gek Luang v Ng Ai Tiong & Ors* [1999] 1 SLR 434 the court in Singapore held that the correct approach before granting leave was for the court to be satisfied that there was a reasonable basis for the complaint and the action sought to be instituted was a legitimate or arguable one.

[36] The term 'legitimate' and 'arguable' was defined in *Agus Irawan v Toh Teck Chye* [2002] 2 SLR 198 where the court held that:

> the terms 'legitimate' and 'arguable' must be given their common and natural meanings. This simply means that the claim must have a reasonable semblance of merit. It was not required to prove that the action is bound to succeed or likely to succeed, but that if proved, the company would stand to gain substantially in money or money's worth.

[37] In the present case, the court finds that the application was primarily brought out by the plaintiff of a concern for the interest of Celcom and with an honest belief in its merit. The plaintiff's honest belief is evidence of its good faith and the fact that he may have a personal interest in the litigation, has started a personal action against Celcom and the party acting in concert (in another case) does not amount to bad faith as argued by the defendants.

[38] The plaintiff's proposed action under s 181A(1) of the Companies Act 1965 is in respect, inter alia, of the unlawful actions of the proposed defendants in deliberately refusing to comply with the clear terms of the ARSA and in causing Celcom to bear the losses arising therefrom.

[39] From the facts stated above, on the face of it, it appears that the main beneficiaries of the wrongdoings have been Telekom, Telekom Enterprise and parties acting in concert as they have succeeded in taking over Celcom at a relatively cheap price and the financial burden of paying compensation to DeTeAsia was passed on to Celcom.

A **[40]** The plaintiff is seeking leave to bring the present action on behalf of Celcom to remedy what he claimed to be the unlawful and illegal actions of those who have caused Celcom to commit the acts alleged in the plaintiff's proposed statement of claim. This proposed action is in the interests of Celcom as well as its former shareholders.

B

[41] This is because prima facie such acts have caused loss to Celcom and Celcom should have the right to sue the perpetrators. Celcom had to pay compensation to DeTeAsia (when all Celcom had to do was to obtain DeTeAsia's consent to the SPA procure a buy out offer for DeTeAsia at RM7 per share, which would not have cost Celcom any money as this would have had to be paid by Telekom since Telekom would have been the purchaser).

C

[42] In addition, the complaints also show that the shareholders of Celcom suffered losses as the result of the alleged unlawful and illegal actions of the proposed defendant. This is because under the MGO, Telekom Enterprise was required to pay the 'highest price paid or agreed to be paid' by Telekom and parties acting in concert during the period of six months before the offer period ie during the period commencing 28 April 2002 until 20 May 2003: (Paragraph 20(1) of the Malaysian Take-Over Code). In order to save Telekom from the burden of making an MGO at a cost of RM9.34b and also to avoid the need to seek DeTeAsia's consent to the SPA, the proposed defendants appear to have conspired to cause Celcom to breach its obligations under the ARSA.

D

E

F

[43] In *Agus Irawan v Toh Teck Chye*, Choo Han Teck JC held that the court is entitled to assume that every party who comes to court with a reasonable and legitimate claim is acting in good faith. As such, the burden of proof is on the opponent to show that the applicant did act in bad faith. The court is satisfied that the proposed defendant has failed to discharge the burden of proof.

G

[44] The defendants argue that the plaintiff cannot meet the good faith test as the application was purportedly not made in good faith and was for a collateral purpose and/or an ulterior motive. The defendants' central argument is that the real motivation underlying this application is to aid the plaintiff in his personal action and to pressure the defendants to discontinue their legal action against the plaintiff's associates. The defendants describes this application as just one of the series of tactics used by the plaintiff in ongoing disputes between it and the plaintiff and between it and the plaintiff's associates. The defendants further claim that since the plaintiff did not have a bona fide interest in the derivative action, good faith has not been proven.

H

I

[45] In *Teo Gek Luang v Ng Ai Tiong & Ors*, the applicant was a *shareholder and director* in a company known as Transcity Cargo System Pte Ltd. She applied for leave to commence a derivative action in the name and on behalf of the company, the object of which was to recover a sum allegedly owned by the company's managing director to the company. Lai J accepted that the applicant did not, at the time of the application, have a happy relationship with the board, and indeed had personal disputes with the managing director, but held that these matters taken together did not constitute bad faith. Although the applicant may not be completely neutral and objective in her view of things, there was nevertheless substance in her complaint that the directors should not have allowed the managing director's loans to remain outstanding for so long without a reasonable and realistic schedule of repayment. Her application was therefore granted.

[46] In the present case, the court is of the view that if the proposed action itself is meritorious and legitimate, the court is not overly concerned that the plaintiff's self-interest or other considerations may have motivated the application (see *Re Winpac Paper Products Ltd; Seow Tiong Siew v Kwok Low Mong Lawrence & Ors* [2000] 4 SLR 768).

[47] Therefore, even though the plaintiff may benefit commercially if he succeeds in the derivative action, and since the case is a meritorious one and the court considers that the plaintiff is an appropriate person (complainant) to bring the action, there seems little reason not to allow the action to be brought.

[48] Based on the discussion above, it is clear that the plaintiff has a genuine claim against the proposed defendants. However, the directors of Celcom have unreasonably been reluctant to pursue the proposed action with the appropriate vigour. The defendants seem to be acting with malovent intent in trying to cover up the alleged gross misconduct of its directors and advisors as well as that of Telekom, as alleged by the plaintiff. This is based on the fact that Celcom had already become a subsidiary of Telekom and Telekom Enterprise before the MGO was concluded and clearly was under the control of Telekom Enterprise and Telekom.

[49] Therefore, it is unlikely that Celcom will bring the proposed action as allegations made and remedies will be sought in the course of the proposed action against the directors of Celcom as well as the ultimate holding company of Celcom, Telekom Malaysia Bhd and the Telekom Directors.

INTEREST OF THE COMPANY (CELCOM)

[50] Under s 181B(4)(b), in deciding whether or not leave should be

granted, the court shall also take into account whether *it appears prima facie to be in the best interest of the company that the application for leave be granted*.

[51] The section does not say that the court must be satisfied that it is in the best interest of the company. In effect, it merely says that the court is to be satisfied that *it appears prima facie to be in the best interest of the company to bring the suit*. The court takes that to mean that what is sufficient at this stage is that a prima facie arguable case be shown to subsist (see *Bellman v Western Approaches Ltd* (1981) 33 BCLR 45 (CA)).

[52] Williams J articulated the test of whether an action is prima facie in the interests of the company in the case of *Discovery Enterprises Inc v Ebco Industries Ltd* [1997] BCTC LEXIS 5338 as follows:

> The real question here is whether in the circumstances of this case, 'it is prima facie in the interests of the company that the action be brought' (s 222(3)(c)). It will be noted that the Legislature has said that it is sufficient to show that the action sought is prima facie in the interest of the company and does not appear to require that the applicants prove a prima facie case. Presumably the authors of that legislation had in mind that a minority shareholder being in a real sense on the outside is often not in a position to obtain evidence such as that the Crown could be expected to put forward to found a prima facie case in a criminal matter.
>
> ... This application decides nothing more than whether the applicant has adduced sufficient evidence which on the face of that evidence discloses that it is, so far as can be judged from the first disclosure, in the interests of the company to pursue the action.

(See also: *Re Nortwest Forest Products Ltd* [1975] 4 WWR 724 (BC SC)).

[53] The proposed action in the present case seeks to restore Celcom as an independent company and return the benefits of being a shareholder of Celcom to the shareholders prior to the MGO. This is because, as a result of the MGO, these shareholders of Celcom were (as a result of the alleged misrepresentation and conspiracy) deprived of their membership of Celcom, which, after the TRI/Celcom restructuring had a tremendous future (as can be seen from the RM1.7b capital repayments which it had already made to Telekom), at a gross undervalue. Celcom itself lost its independence and become a wholly owned subsidiary of Telekom.

[54] Based on newspaper reports, obviously Celcom is now a major force within the Telekom Group and the future of Telekom depends to a large extent on the continued growth of success of Celcom. Celcom's present success was due to the TRI/Celcom restructuring and the financial planning put into place by the previous management when Celcom was an independent company. Indeed, from information available, it is obvious that

Telekom had in mind taking control of Celcom well before they actually implemented the conditional SPA for the merger of the cellular businesses of Celcom and TM Cellular and the MGO.

[55] Based on publicly available records, Telekom succeeded in gaining effective control of Celcom/TRI as early as 28 April 2002 through the acquisition of 260,870,500 in Technology Resources Bhd ('TRI') (whose listing status was assumed by Celcom) shares from Danaharta. The price of RM2.75 per share was the basis for the offer price of RM2.75 per Celcom share under the MGO. This acquisition together with subsequent purchase gave Telekom effective control of Celcom/TRI and enabled them to put into effect their plans for the conditional SPA for the merger of the cellular businesses of Celcom and TM Cellular and the MGO.

[56] The fact that Celcom has featured so prominently in Telekom's plans since then, and the fact that Celcom has almost immediately been able to make massive capital repayments to Telekom (RM1.7b) proves that Celcom was indeed a company with a tremendous future of which the directors of Celcom must have been fully aware.

[57] Celcom's tremendous potential and its enhanced value following the restructure must have been well within the contemplation of the directors of Celcom and their advisors. The failure of these directors (who were nominees of Telekom) and their advisors to protect the interests of Celcom and its shareholders is the subject matter of the proposed action under s 181A(1) of the Companies Act 1965.

[58] On the facts, there are reasonable grounds that Telekom was instrumental in causing Celcom to enter into the conditional SPA and to breach the ARSA thereby giving rise to the award under the ICC Arbitration. When Celcom entered in the ARSA, which contained the buy out provision, Celcom could not have had any intention to merge with Telekom's cellular business. Telekom, however, had such a plan and carried it out regardless of whether such a plan was in the best interest of Celcom.

[59] Further, it is apparent that Telekom caused Celcom to assume all liability for damages arising from breach of the buy out provision in the ARSA and it is also appellant that the Celcom directors went along with all Telekom's plans, at the behest of Telekom without any regard to the interests of Celcom, thereby not only causing Celcom to suffer loss through the award under the ICC Arbitration, but also causing Celcom to merge with Telekom's cellular business.

A **[60]** In addition, it also appears that the merge of Celcom with TM cellular caused damage to Celcom and this gave further reason for the proposed action to be filed.

B **[61]** The merger, through the conditional SPA seems not in the interests of Celcom and that Celcom would have been much better off and stronger on its own. Indeed, it appears that the merger saved TM cellular and only benefited Telekom.

C **[62]** Celcom was a very strong company with much better fundamentals and a stronger customer base than TM cellular. TM cellular on the other hand was weak. This is not only clear from the exhibits but also from the defendant's affidavit No 2. The very fact that Celcom occupies such a prominent place in the Telekom Group and that it can in effect support an entirely new 'International Group' speaks for itself. Indeed, it is apparent that left to its own devices, Celcom would never have merged with TM cellular.

[63] Therefore, based on the facts stated above, it is unlikely that Celcom E will bring the proposed action as allegations will be made and remedies will be sought (including substantial damages) in the course of the proposed action against the directors of Celcom as well as the ultimate holding company of Celcom, Telekom Malaysia Bhd and the Telekom directors. Leave should be granted to the plaintiff as it is definitely in the best interest F of the company if the proposed action is brought.

[64] If the proposed action is successful, Celcom may well recover well in excess of RM1b in damages from the proposed defendants and perhaps much more. Moreover, the MGO and the conditional SPA would have to be G unwound and Celcom would be restored to its position of being an independent company, with its own successful cellular business, instead of just being a subsidiary of Telekom. Thus, prima facie it cannot be disputed that Celcom's financial and business position would be significantly improved if the proposed action is successful. H

[65] The court is satisfied that the plaintiff has adduced sufficient evidence which on the face of that evidence disclose that it is, so far as can be judged from the disclosure, in the interests of the company to pursue the action. I

[66] One of the prayers pleaded by the plaintiff in the plaintiff's proposed claim is to declare the MGO that took place as illegal and unlawful and to unwind the entire transaction. It is argued by the defendant that it would not be in the best interest of Celcom to unwind the entire MGO and all related

acts, including the defendant merger at this stage. The defendant claimed that such an act would have a disastrous effect on Celcom's stability and market reputation.

[67] The defendant seems to suggest that it will not in the best interest of Celcom to unwind the entire transaction now since Celcom has *moved* on with its corporate exercise. This surely cannot be a defence at the full trial let alone at the *leave* stage.

[68] If the plaintiff is prevented from pursuing this action simply because the transaction has been *done* then it would mean that any illegal act can be immune from challenge on the grounds that it has been completed and unwinding it would too much trouble. This cannot be right.

GOOD AND ARGUABLE CASE

[69] The present application is only an application for leave. It is important to note that at this leave stage of the proceedings, the court is not to embark on substantial issues on merits. All that the plaintiff need to show for leave to be granted as enshrined in s 181A of the Companies Act is that there is a prima facie case and the application is not frivolous and vexatious and there is some substance in the grounds supporting the application.

(See *Clear Water Sanctuary Golf Management Bhd v Ketua Pengarah Perhubungan Perusahaan & Anor* [2007] 6 MLJ 446).

[70] In *Teo Gek Luang*, the court held that:

> ... at the leave stage, the court was not called upon to adjudicate disputes of fact and inference but to determine if there was prima facie merit in the proposed action.

[71] In *Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 3 MLJ 228, Ajaib Singh said at p 229:

> At the outset of the hearing of the appeal before us we indicated to the parties that we would hear submissions on the issue of leave only. After giving due consideration to the evidence in this case and the submissions advance by the parties we were of the view that leave to apply for an order of certiorari ought to have been given. In his ground of judgments the learned judicial commissioner had gone further than the leave stage and embarked on substantial issue on merit. We did not think that this was the right approach when the application for leave to apply or an order of certiorari is made. The guiding principle ought to be that the applicants must show prima facie that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application. On the evidence in this case we found that the appellants had prima facie an arguable case

for the granting of the relief they were seeking. Their application was not frivolous or vexatious. There were grounds to consider the allegations made by the appellants and which could be properly heard and determined on the substantive application for an order of certiorari after leave has been granted.

[72] In *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164, the court held:

> The whole purpose of requiring that leave should be first obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at this stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of the a judicial discretion to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all evidence is in and the matter has been fully argued at the hearing of the application.

[73] The court shall now consider, the various issues raised by the plaintiff in showing that the plaintiff has a good and arguable case against the proposed defendant.

BREACH OF DUTY BY THE DIRECTORS OF CELCOM

[74] Directors generally owe duties to the company and not the shareholders individually, but where the law imposes or the directors assume a special relationship with the shareholders, the directors owe duties over and beyond the norm to shareholders. These special duties can be due to a special relationship or in the context of takeover situations where the directors and advisors have duties to advise on the offer and whether to accept. It is also the case where the directors issue circulars to shareholders to give information or to seek approval such as the IAC and the circular for the SPA (see

(i) Securities Commission Act 1993, ss 33, 33A, 33B, 33D, 33E, 34, 34A, 34B and 34C;

(ii) Malaysian Code on Take-Overs and Mergers 1998, ss 14, 15, 16, 34, 35, 36, 38 and 39, Schedules 1 and 2 & Practice Notes 1.3, 4.1, 4.2, 4.3 and 4.4; and

(iii) Section 131 of the Companies Act 1965).

[75] When the directors owe fiduciary duties to the shareholders, particularly in the way in which they go about any take-over and the persuasion of shareholders to sell their shares, they are therefore obliged not to make to shareholders statements on matters material to the proposed

dealing which were either deliberately or carelessly misleading, and to disclose material matters as to which they knew or had reason to believe that the shareholder whom they were trying to persuade to sell was inadequately informed (see *Coleman v Myers* [1977] 2 NZLR 225, the Supreme Court of Auckland).

[76] In *Gething v Kilner* [1972] 1 All ER 1166, the court in England held:

> the directors of an offeree company owed a duty to their shareholders which included the duty to be honest and not to mislead; any minority shareholders of such a company could properly complain if they were being wrongfully subjected to the power of compulsory purchase by the offer or company under s 209 of the Companies Act 1948 as a result of a breach of duty on the part of the board of the offeree company.

[77] In the present case the directors of Celcom clearly owe duty to the company, Celcom and its shareholders. They owe a duty to act in Celcom's interests, to advise Celcom and its shareholders properly, and to present the facts and issue relating to the SPA and the MGO in a clear and understandable manner. They also owe a duty to act in the interest of shareholders and not to mislead them over the buy out and the ARSA. They should also have had the shareholder's interests at heart to enable them to obtain the best price for shares.

[78] The fiduciary duty to act bona fide in the interests of the company as a whole requires the directors to act in the best interests of the shareholders as a collective group. However, difficulties arises in situations where a nominee director is appointed to represent the interests of particular persons (persons with a significant stake in the company will often appoint someone they trust onto the board to monitor its activities, ie Telekom in the present case). The purpose of appointing nominee directors is that they act as representatives and in the interest of their appointors rather than the members generally.

[79] Cases reported in England and Malaysia has adopted a strict approach regarding the duties of nominee directors. In *Scottish Co-Operative Wholesale Society v Meyer* [1958] 3 All ER 66, Lord Denning held that where the interests of the appointors and the company do not coincide, a nominee director is bound to put the interests of the company ahead of the sectional interest he represents.

[80] In another case, *Raffles Hotel Ltd v L Rayner* [1965] 1 MLJ 60, Winslow J stated that:

A company is entitled to the undivided loyalty of its directors. A director who is a nominee of someone else should be left free to exercise his best judgment in the interests of the company he serves and not in accordance with the directions of the patron.

[81] Therefore, in participating in the alleged conspiracy to enable Telekom to complete the MGO at RM2.75 per share instead of RM7, there is sufficient ground to belief that the directors of Celcom had breached all their duties to Celcom and its shareholders.

BREACH OF DUTY BY ALLIANCE INVESTMENT BANK BHD

[82] At all material times, Alliance had been appointed by Celcom to act as independent advisor to the shareholders of Celcom in respect of the MGO and also was acting and had agreed to act and been appointed to act as advisor to Celcom in relation to the MGO. Alliance therefore owed an express and/or implied duty under common law and statute to Celcom and the shareholders of Celcom to advise in an expert, professional, honest, independent and thorough manner, in the best interests of Celcom and its shareholders in accordance with the highest professional standards and in accordance with the provisions of the Banking and Financial Institution Act 1989 ('BAFIA'), Securities Commission Act 1993 and Securities Industry Act 1983.

[83] However, in this case, there is sufficient ground to belief that Alliance has acted in breach of its various duties when Alliance acting in concert with the directors of Celcom issued the misleading IAC under which they advised the plaintiff and other shareholders to accept the offer under the MGO.

BREACH OF S 67 OF THE COMPANIES ACT 1965

[84] Section 67 of the Companies Act 1965, prohibits the giving of financial assistance by a company to enable a third party to purchase that company's shares.

[85] In the present case there are grounds to show that the directors caused Celcom to give financial assistance to Telekom and Telekom Enterprise to buy its own shares on at least three occasions:

(a) when Celcom signed the SPA and chose to breach the buy out provision under the ARSA instead of requiring Telekom and Telekom Enterprise to pay RM7 per share to DeTeAsia;

(b) when Celcom agreed to pay damages equal to the difference between

RM7 and RM2.75 per share to DeTeAsia instead of insisting that Telekom and Telekom Enterprise should pay as a condition of the SPA and the MGO; and

(c) when Celcom made capital repayments of up to RM1.7b to Telekom and Telekom Enterprise shortly after completion of the MGO.

[86] By reason of the aforesaid breach of s 67 of the Companies Act 1965 the SPA and all purchases of Celcom shares made subsequent to the notice of MGO dated 3 April 2003, the offer document, the IAC and the MGO by Telekom, Telekom Enterprise and parties acting concert may be tainted with illegality and void.

BREACH OF THE SECURITIES COMMISSION ACT 1993 AND THE MALAYSIAN CODE ON TAKE-OVERS AND MERGERS

[87] The Take-Over Code has been prescribed pursuant to s 33A(1) of the Securities Commission Act 1993 and by reason of s 33B of the same Act compliance with the Take-Over Code in compulsory.

[88] By reason of the matter particularised above especially bearing in mind the fact that Celcom was under the control and management of Telekom and became a subsidiary of Telekom Enterprise before the offer document was posted, and hence that the Celcom directors were in effect nominees of Telekom, the breach of the ARSA agreement and the award given in the arbitration and also from the fact that the offer document and the IAC were thus consistently drafted by the holding company and the subsidiary and their respective advisors in such a manner as to mislead and misrepresent so that the shareholders of Celcom would not have been aware of the true details and effect of the ARSA, the buy out provision and the ICC Arbitration, the court believes that Telekom, Telekom Enterprise and parties acting concert may have breached s 20(1) of the Take-Over Code in that the MGO should have been made at RM7 instead of RM2.75 per Celcom share.

FRAUDULENT AND/OR NEGLIGENT MISREPRESENTATION

[89] Section 18 of the Contracts Act 1950 defines 'misrepresentation' to include:

(a) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(b) any breach of duty which, without an intent to deceive, gives an

advantage to the person committing it, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; and

(c) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

[90] In *Pertab Chunder Ghose v Mohendra Purkait* [1888–1889] 16 IA 233 (as cited in *Kheng Chwee Lian v Wong Tak Thong* [1983] 2 MLJ 320), Sir Richard Couch in giving judgment of the Privy Council said at p 237:

> Where one party induces the other to contract on the faith of representations made to him, anyone of which is untrue, the whole contract is, in a Court of Equity, considered as having been obtained fraudulently …

[91] In the present case, there are sufficient grounds to show that in breach of the duties abovesaid the proposed defendants may have expressly and/or impliedly fraudulently misrepresented to Celcom and the shareholders of Celcom the true facts of the MGO both in the offer document and the IAC for the purpose, inter alia, of misleading Celcom and the shareholders of Celcom as to their true rights with regard to the MGO and SPA.

[92] In any event, the proposed defendants may be liable for negligent misrepresentation. The proposed directors have a duty to take care in making statements. Such duty arises based on the fiduciary relationship between the parties. The proposed defendants are the right parties to be sued in this case because they may have caused damage to Celcom and its shareholders when they expressly and/or impliedly negligently misrepresented the true facts of the MGO both in the offer document and the IAC with the intention that Celcom and the shareholders of Celcom would rely on the misrepresentation.

BREACH OF S 24 OF THE CONTRACTS ACT 1950

[93] By reason of he aforesaid breaches of the relevant provisions of law, the court is of the view that all contracts made in connection with the MGO and the SPA and all contracts for the purchase of or subscription for Celcom shares under the MGO may be considered illegal for breach of s 24 of the Contracts Act 1950 and may be set aside if duly proven by evidence during trial of the proposed action.

[94] Any contract which is conditional upon and or predicated upon or requires the commission of an illegal act by a third party is illegal and in breach of s 24 of the Contracts Act 1950. The principle was adopted by the

Court of Appeal in *Shahidan Shafie v Atlan Holdings Bhd & Anor* [2005] 3 CLJ 793, where Gopal Sri Ram JCA said the following:

> Now, here is a case where there is a challenge to the validity of an agreement entered into by a company of which the plaintiff is a shareholder. The challenge is on grounds of illegality. Even if the present proposed amendment does not assist the plaintiff it appears to me that there is a plea of illegality on other grounds but on the same facts fairly available for the plaintiff to take. There is no doubt that the agreement in this case between Danaharta and the second defendant has a part of its consideration — indeed it appears to be condition of that agreement …

[95] Thus since there are grounds that the SPA and the MGO were entered into pursuant to illegal acts and breaches of statute, completion of the SPA and MGO may be considered illegal and in breach of s 24 of the Contracts Act 1950.

CONSPIRACY

[96] A conspiracy consists of an agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means. *Halsbury's Laws of England* (4th Ed) at para 1527, states that the essential ingredients of conspiracy are (1) an agreement between two or more persons, (2) an agreement for the purpose of injuring the plaintiff, and (3) that acts done in execution of that agreement resulted in damage to the plaintiff. It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place; it is necessary to show a meeting of minds, a consensus to effect an unlawful purpose though it is not necessary that each conspirator should have been in communications with each other.

(See *Hock Hua Bank (Sabah) Bhd v Lam Tat Ming & Ors* [1995] 4 MLJ 328; *Mrs Kok Wee Kiat v Kuala Lumpur Stock Exchange Bhd & Ors* [1979] 1 MLJ 71; *Belmont Finance Corp v Williams Furniture Ltd & Ors (No 2)* [1980] 1 All ER 393, *Clerk and Lindsell on Torts* (13th Ed) p 817).

[97] It is also not necessary for every party to the conspiracy to have joined at the same time or been involved from the inception. Thus, in the present case, Telekom may have initiated the conspiracy, and the other proposed defendants may have joined later.

[98] In *Kuwait Oil Tanker Co SAK & Anor v Al Bader & Ors* [2000] 2 All ER 271, Nourse LJ held the following:

> Thus it is not necessary for the conspirators all to join the conspiracy at the same time, but we agree with the judge that the parties to it must be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the acts complained of.

[99] In the present case by reason of the aforesaid matters particularised above, inter alia, through the breaches of the fiduciary duty and statutory duty and fraudulent and/or negligent misrepresentation it is apparent that the proposed defendants may have wrongfully and maliciously and by unlawful means and/or fraudulently conspired and combined amongst themselves to injure Celcom and its shareholders.

[100] It is also apparent that the proposed defendants had wrongfully and maliciously conspired and combined amongst themselves with the real and predominant purpose of benefiting Telekom and Telekom Enterprise and parties acting in concert with them to enable them to make the MGO at an offer price of RM2.75 per Celcom share instead of RM7 and causing losses to Celcom and the shareholders of Celcom.

[101] CIMB has admitted that it was instructed to advise Telekom on the SPA and the MGO well before Telekom had even gained effective control of Celcom. Telekom therefore already has a preconceived plan. By the time the SPA was signed, Telekom already had the effective control of Celcom and had appointed their nominees to the board to take control.

[102] Thus by the time the decision to breach the ARSA was made and to effect the MGO at RM2.75 instead of RM7, Celcom was already under the control of Telekom and the Celcom's directors are the nominees acting at the behest of Telekom to implement 'Project Housecoming' at the cost of the plaintiff and other shareholders of Celcom.

[103] All the ingredients of the alleged conspiracy are present and have been pleaded properly in the proposed pleadings. Further, the plaintiff's obligation at this stage is to plead material facts, not evidence or law. The rest is a matter of proof during trial.

[104] The plaintiff's proposed statement of claim sets out all the acts relied on and suffice it to state at this stage that the plaintiff has satisfied the rules of pleading and has pleaded a reasonable cause of action against the proposed defendants. The rest is a matter of proof at trial, and it is established law that proof takes the form of both evidence in chief from the witnesses of the plaintiff, and cross-examination of the respective defendants' witnesses.

[105] In addition, the very nature of a claim properly pleaded as a claim for conspiracy requires a full trial to be heard and cannot be decided based on affidavits. Thus in *Lornho plc & Ors v Fayed & Ors (No 5)* [1994] 1 All ER 188, Evans LJ said, after discussing the issues raised in a conspiracy action:

It may well be said that any proceedings which raise these issues is quintessentially a case for trial. The nature of the allegation in the present case is such that a long and expensive trial is inevitable, but that is the result of the way in which the tort is defined.

[106] The tendency of the defendant in wanting to fight the whole case on the merits at this stage is misconceived. The merits of the defence cannot be determined at this leave application. The nature of the case requires that a full trial with witnesses be called. Further, the fact that the defendant feels compelled to delve into the merits of the case at this stage shows that there are issues to be answered at the trial.

[107] The defendant contention is that it is neither the role nor function of the court to hear appeal from the management decisions if the directors consider the matter and honestly decide that it would not be in the company's interest to commence or defend the action.

[108] In *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821, the courts have acknowledged that the decision whether or not to commence an action on behalf of the company is often as much a matter of business as of law.

[109] It appears at first glance that the business judgment rule has a significant role in the statutory derivative action. The defendant seems to have taken this principle to his advantage by claiming that the company's directors' decision to litigate are in a sense commercial decisions, involving not only cost-benefit analysis but also considerations of potential damage to the company's reputation. In addition, the defendant claims that Celcom's directors, when considering whether to honour their obligations under the ARSA had taken the decision honestly, reasonably, within lawful limits and always in the interest of Celcom.

[110] The court is of the view that the business judgment rule should have no role in the present case. This is because the present case involves the allegation of breaches of duties by the directors of Celcom and conflict of interests (the directors of Celcom are also the nominees of Telekom). This breaches involves self-serving behaviour which is culpable and at the expense of the corporate interest of the company as well as the shareholders.

[111] Further, there is allegation that the directors of Celcom have conspicuously failed to reveal the exact details of the legal advice received by them to the shareholders. They should give all the exact details of the advice to the shareholders and allow them to make considered decision in relation to the MGO. Therefore, an adverse inference may be drawn from the

conduct of the directors in refusing to reveal the exact details of the legal advice given to them to the shareholders.

[112] Therefore, based on the above arguments, the court is of the view that the court has the discretion to interfere with the decision of the management in this case. This is because the correctness of the decisions of the directors in the present case is questionable as they were not arrived at bona fide and were self-serving. The decisions also adversely affect the interest of Celcom and its shareholders.

CONCLUSION

[113] In an application for leave under s 181A of the Act, a complainant had to show that he was acting in good faith, and that it was prima facie in the interests of the company that the action be brought. The complainant had to demonstrate that there was a reasonable basis for the complaint and that the proposed action was legitimate and arguable, in that it had a reasonable semblance of merit. It should also be remembered that this is an application for leave. The plaintiff is not required to prove his case on merit.

[114] At the leave stage, which is the threshold stage, the court is not to go into substantial issues on merits. All the applicant has to do is to follow the threshold requirement by showing a prima facie case and that the application is not vexatious and frivolous. There must be some substance in the grounds supporting the application.

[115] The court should grant leave if it is clear that there is a point for further investigation on a full interparte basis with all such evidence as is necessary on the facts and all such arguments as is necessary on the law.

[116] In *Carr v Cheng* [2005] BCSC 445 the Supreme Court of British Columbia in dealing with the same subject matter under ss 232 and 233 of the Business Corporation Act SBC 2002 C 57, held:

> It is obvious that a judge hearing an application for leave to commence an action, cannot try the action. I believe it is my function to deny the application if it appears that the intended action is frivolous or vexatious or is bound to be unsuccessful. Where the applicant is acting in good faith and otherwise has the status to commence the action, and where the intended action does not appear frivolous and vexatious and could be reasonably succeed; and where such action is in the interest of the shareholders, then leave to bring the action should be given.

[117] It is to be stressed that at this stage that the threshold requirement or guiding principles for leave to bring an action on behalf of the company

under s 181A of the Companies Act 1965 should not be narrowed down to an extreme edge so as not to impose or place undue burden or shackles on a plaintiff to such an extent that it may eventually frustrate the object of the procedural rules for seeking leave.

[118] Based on the pleadings and the facts disclosed, the court is satisfied that the plaintiff has clearly satisfied all the requirements under s 181A and s 181B of the Companies Act 1965 that:

(a) the plaintiff has proved that he is a 'complainant' within the meaning of the Act;

(b) the plaintiff has also made out a legitimate and arguable case against the proposed defendants. The plaintiff has presented sufficient evidence to show that he is acting in good faith in bringing this action. It is to be emphasised that at this stage, the plaintiff does not need to set out all the details of the action. It is sufficient that the request disclose the nature of the cause of action and the circumstances to which it relates;

(c) the plaintiff has also shows that it is prima facie in the interest of Celcom that the proposed action be brought. It is to be emphasised that at this stage, showing that the action is in the best interest of the company just requires showing that there is a sufficient basis for the cause of action on the face of the facts presented. It is not necessary for the plaintiff for leave to show that the action is likely to succeed.

[119] Therefore, the court finds that the plaintiff has, at this stage, complied with all the procedural requirements as required under s 181A and s 181B of the Companies Act 1965 to obtain leave.

[120] Based on the above considerations the court grants leave in favour of the plaintiff as in prayer (1) of the application with costs.

[121] Prayers 2, 3, 4 of the application (encl 1) relate to the ancillary order under s 181E of the Companies Act 1965 in the event leave is granted. The court will hear further submissions by both sides later to determine those prayers.

Application allowed with costs.

Reported by K Nesan